SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 219.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

The important corrections deemed essential by counsel to be made to our original statement of the case are not apparent from their copious references to the record. Nothing that we have recited from it is successfully challenged. Our references to it have been assailed, and, following their usual custom, counsel have accused us of perverting facts in framing our assignments of error, but in no instance have their charges found support.

It is wise to avoid a bad example. But for this we might retort with perfect propriety that counsel's statement of the

facts is subject to all the criticisms leveled at our own. It is sufficient, however, to say that some of the things they attribute to the record belong rather to counsel's misunderstanding of the facts and to an eleventh-hour preparation of their brief, when time, being more precious than accuracy, gave scant opportunity for careful study.

Thus, on page 2, it is said that the respondent defended upon the grounds that petitioner and its predecessors had allowed the respondent under a claim of right, &c., to expend over one hundred and twenty-five thousand ($125,000) dollars in the mining of its tunnel, and had, in fact, consented and acquiesced therein, until after the expenditures had been made, and until after the discoveries of the blind lodes had been made by the respondent through the extension of its tunnel, &c.

This action was brought in the State district court of El Paso county on June 15, 1897 (Transcript, p. 1). It was removed to the circuit court of the United States on July 16, 1897 (Transcript, p. 15). The respondent filed two answers, on September 19, 1898 (Transcript, p. 33), and February 10, 1900 (Transcript, p. 50), respectively. In both these answers the discoveries of the "blind lodes" are alleged to have been made long after the suit was brought, and the location certificates thereof recite the dates of their discoveries as December 18, 1897; December 23, 1897; January 6, 1898, and December 15, 1897, respectively (Transcript, pp. 132, 134, 136, and 137). How, then, could petitioner have acquiesced in the prosecution of work on the tunnel until these alleged lodes were discovered?

Again counsel say (page 6) that it is claimed by the respondent and expressly pleaded in its answer that the alleged discoveries claimed to have been made on the Little Mary and Ocean Wave Lode claims, and which constituted the origin and basis of all title thereto, were not in fact made until long after the location of the Uinta Tunnel site, &c.

The only reference to this subject to be found in the pleadings occurs in the 21st paragraph of the affirmative answer. The respondent there avers that petitioner's patent was issued subject to the acts of Congress concerning tunnel rights, and to the laws of Colorado concerning the right to run tunnels through patented ground, for the purpose of reaching territory belonging to tunnel-owners beyond it, and subject to respondent's rights to any and all "lodes, veins and mining claims it might cut or discover in driving the tunnel; that the pretended discovery of petitioner alleged and pretended to have been made in and upon said pretended lodes was not made until long after the location of the Uinta tunnel, and at the time said pretended locations were made, the locators thereof were advised and knew that the tunnel had been located, and was being prosecuted with due diligence, and that the Ocean Wave and Little Mary Lode mining claims, so far as the same may now be claimed and possessed by the said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with section 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to follow said lode claims as located by this defendant, and to reach lode claims so owned by this defendant as heretofore and hereinafter stated."

An allegation that the plaintiff pretended to make a pretended discovery in pretended claims after defendant's location refers necessarily to the date of the pretense—not to the date of the discovery. The making of the latter at any time was denied elsewhere. A pretended discovery is no discovery; and if it be true that none other than a pretended discovery was made by petitioner's grantors, then the date of the pretense is unimportant.

But, counsel continue: "It being pleaded by the defendant that its tunnel-site location was made prior to the lode location, it being denied in the answer that the lode loca-

tions were made prior to the tunnel-site location, in determining the materiality and sufficiency of these allegations, it must be taken as true as a matter of fact that the tunnel-site location was prior in date of location, and superior in matter of right to the date of location and the rights of the lode mining claims." Why? Is the denial of this defendant, assuming it to have been made as stated, so potent that it must stand as against all other assertions? It is of course true that a plaintiff must prove in the first instance all controverted allegations of material fact at the peril of a nonsuit. But this has to do with the burden of proof, not with the superior quality of the defendant's assertion.

But the statement is that of counsel. It is not that of the record. We have heretofore adverted to the fact that there is in this case no general denial. Not only so, there is no denial whatever of the date of the petitioner's locations. On the other hand, the respondent in its affirmative answer alleges the date of its own location as January 13, 1892, or eleven days thereafter. These things appearing, any allegation to the effect that the younger location was in fact the elder would be absurd.

We plead guilty to the charge that we have constantly asserted that our lode claims were first located and that the fact was overlooked by the circuit court of appeals, and we deny that "the reverse is true." It appears from the pleadings, from the petitioner's testimony, and from that offered by the respondent and excluded by the trial court. It is this fact which undermines the reasoning of his honor Judge Sanborn and should prove the undoing of the respondent here. We are in truth forty-seven days and admittedly eleven days senior in time to the Uinta Tunnel location, and that is sufficient.

We are accused of treating the decision of the circuit court of appeals discourteously, and of casting aspersions upon it. This gratuitous assertion is wholly without excuse. It was doubtless inspired by the conviction that no other answer

could be made to our contention of its inconsistency with the Calhoun-Ajax case, but that does not justify its utterance. The respect we entertain for that court and the judges composing it, our personal regard for his honor Judge Sanborn, as well as for the requirements of professional duty, prompt us to repel this imputation. Surely we seek to reverse the judgment of the circuit court of appeals because it is not in harmony with the doctrines of this court or the laws of the United States. We know of no other way in which it can be done, and respondent's counsel are welcome, so far as we are concerned, to a monopoly of personal innuendo.

Coming now to the substance of respondent's argument, it is well to determine what was the nature of the issues it sought to frame by the answer to petitioner's complaint, and why the motion to strike certain of its averments from the record was sustained. It will be seen (Transcript, p. 37) that after admitting the corporate character of the parties and the amount involved in the controversy it denied that plaintiff had been the owner in fee of the Ocean Wave and Little Mary claims, or entitled to their possession. It also denied that the claims were ever discovered or located, or that it ever ousted the plaintiff from their possession or any part thereof. By our code, ouster need not be proven by plaintiff if the defendant files any other answer than a disclaimer. It also attempted to deny the validity of petitioner's patent, declared it to be null and void, and that no discovery of a mineral vein was ever made in them, or that the patent had any relation to any discovery, or that the claims were ever located. It further alleged that plaintiff for more than a year before the commencement of the action knew that the defendant was driving the tunnel through its premises, and that said work was done with the knowledge and consent of the plaintiff. These averments were stricken out because the former assailed the patent and the latter was lacking in nearly all the essential requirements of an estoppel, for which purpose alone it could be material.

The fourteen succeeding paragraphs (Transcript, pp. 38–50) were intended as an affirmative answer and "further defense" to the complaint, in which the location of the tunnel site, its extension, the discovery of several so-called blind lodes beyond the ground in controversy long after the commencement of this action, the acquiescence of the plaintiff in the extension of the tunnel through its ground, the location of the Black Jasper lode across the tunnel by an outsider and its purchase by the defendant, its right to use the tunnel for the development of that claim, its right to cross veins in other claims, are all thrown together. Under the Colorado practice such a condition is not the subject of demurrer, but must be met by motion. Hence plaintiff's demurrer was withdrawn and the motion substituted, which was by the court sustained.

Under our code a defendant may plead as many defenses as he may desire, even though inconsistent, but each must be complete in itself. He cannot confuse seniorities of location, estoppel, the right to use the tunnel for the development of claims by others on the surface, rights created by State statutes, and failure of plaintiff to comply with statutory requirements, all in one answer, and then separate and classify its component parts at the trial. Mr. Pomeroy properly says that in such a case "each defense must be complete in itself, in its material allegations or its denials, to constitute an answer to the cause or causes of action against which it is directed * * * Each must in its composition be complete, sufficient, and full; it must stand upon its own allegations" (Pomeroy on Code Remedies, sec. 716).

Such, indeed, is the express requirement of the Colorado Code.

Independently, therefore, of every other principle than that presented by the pleadings, the defenses were properly stricken out, and being stricken out evidence to support them was properly excluded. The respondent might have reformed its pleadings, and separately stated its several de-

fenses, but it preferred to stand by the answer as framed. It cannot now complain of the exclusion of its offered testimony, its plea having been properly rejected on plaintiff's motion.

But counsel complain that having alleged a discovery of the Ocean Wave and Little Mary claims, we should have been required to prove it. If our proof failed in this point the defendant would have asked for a nonsuit. But it did nothing of the kind. It was content to object that the location certificates offered were inadmissible because no proof of discovery had been made, and the plaintiff, then resting, proceeded with its own offers of testimony.

The claims having been patented, discovery was conclusively presumed and the certificates fixed the date thereof. Their introduction was for that purpose and subserved it. "Patent titles when granted relate to the first initial valid step which is the foundation of the right and in pursuance of which the patent is granted" (Stark *vs.* Starrs, 6 Wallace, 402; Yount *vs.* Howell, 14 Cal., 465; Ely *vs.* Frisbie, 17 Cal., 250). Numerous cases to the same effect might be cited. As the location is the first step in the acquisition of mineral lands and the foundation of the title thereto, the respondents, following the allegation in their answer, put these location notices in evidence. They are not set out in the record, but as chains of conveyances down to the patentees and respondents were put in evidence, it may be assumed that the respondents were not the locators, and if not, then the connection between the patent and the location notice was not complete, even for the purposes of relation, until these connecting evidences were put in. Without them the respondents would have patent title, but it would not appear that that title was connected with the location notices. For the purposes for which this evidence was offered, it was clearly admissible and material (Kahn *vs.* Mining Company, 2 Utah, 188; United States *vs.* Iron Silver

Mining Co., 128 U. S., 673; Justice Mining Co.; see 21 Col., 260; 2 Lindley on Mines, sec. 783).

The certificates of location constitute the basis of petitioner's application for patent. Upon them the official survey was made, the patent applied for, the entry accepted, the certificate of purchase issued, and the patent executed and delivered. It recites upon its face the date of discovery. It would be singular if in the face of all these things petitioner should be required to do anything more than introduce them or the respondent be permitted in a collateral proceeding to attack them. If the Government were itself to institute proceedings for the annulment of our patent for want of discovery, the location certificate with its recitals would be taken as the inception of our title and its direct attack would begin with it.

But counsel say such proof is not conclusive, and error was committed in not permitting respondent to contest it. The sole ground of this contention must be found in the fact that its tunnel was located before the lode claims were entered for patent. This is conclusive of discovery, but they say it is not conclusive on the point of time. Our original brief has been written to no purpose if we have failed to demonstrate that the patent relates to the location and screens the latter from all collateral attack by the owners of tunnel locations of younger date.

It is insisted that the 21st paragraph of the answer sustains his honor Judge Sanborn's reference to an allegation of no discovery prior to the Uinta location. We have hitherto referred to this paragraph, and to what it does allege, as well as to the fact that it is made part of a general affirmative answer, which, properly divided and pleaded, might possibly present a number of distinct defenses. We merely add that a pretended discovery of a pretended lode, pretended to have been made at a pretended time, after pretended locations, does not involve an admission of any discovery whatever. To pretend is to feign or sham; to hold

out or represent falsely. And so the answer, both in its affirmative and negative parts, denies any discovery whatever. But were it otherwise it could not affect either the petitioner's right to all that its patent and location gives it under the law, or the respondent's ability to attack them.

But the respondent relies practically for its defense upon its construction of the Rico-Aspen case, 167 U. S., 104, and which it contends not only absolved it from the necessity of adversing the plaintiff's application for patent, but recognizes its right to attack the patent when its interests should demand. In that case, as before stated, the Group tunnel was senior by eight or nine months to the Vestal location, and the latter not only did not intersect the line of the tunnel, but was parallel to it some hundreds of feet away. The decision establishes the relation of a senior tunnel location to a junior lode location within a radius of 1,500 feet on either side, and declares the former not obliged to adverse the latter's application for patent when its rights are at the time uncertain, contingent, or intangible.

The converse of this proposition should be equally true. If at the time of the patent application for the lode the tunnel right had become tangible, certain, or positive, it should be asserted by an adverse, or it is lost. If at that time the exploitation has been complete and no blind vein has been encountered and its absence has been fully demonstrated, there is nothing in the ground to which the tunnel-owner can lay claim, and the grant of the patent to the premises included within the location is absolute. Surely, if the tunnel-owner is absolved from the duty of adversing the lode application because his interest is too remote and shadowy for identification, the transformation of that condition into a certainty either for or against its existence creates the duty and makes its observance imperative. (See Back *vs.* Sierra Nevada Co. (Idaho), 17 Pac., 83.)

Counsel for the plaintiff in error in the Calhoun-Ajax case were as insistently reliant as are counsel here upon the

doctrine of the Rico-Aspen Enterprise case in support of their claims for the tunnel. Their arguments, too, were quite as well grounded and apposite as those now urged from the same standpoint. But until some good reason, not yet appearing, can be assigned for excluding tunnels intervening between the location and patent of a conflicting mining claim from the operation of the rules defining the rights of senior locations, we respectfully submit that junior tunnel sites, like other junior locations, must be postponed to those which being senior in time are senior in right.

Counsel concede that there are locations of claims made upon discoveries in extending tunnels which must adverse applications for patent to lode claims covering the same premises. But suppose that at the time of such application the tunnel-owner, though making his discovery, has not seen fit to follow it by a lode location, or that by running his tunnel entirely through the ground in controversy he has determined the fact that no vein can be found there, must he not in the first instance, his right having become tangible and certain, adverse and contest for his protection under the statute?

And has he not in the latter case resolved the contingency into the certainty of its non-existence, and shown that there is nothing his tunnel can find, and consequently nothing he can ever claim within the boundaries of his neighbor's premises? Counsel say (p. 19): "In this case there had been within the territory now involved no discovery of a blind lode in conflict with the claims of the petitioner at the time of the application which would have entitled it to file an adverse, nor are the rights here in dispute of such a nature that had they existed at the time of the application for patent the tunnel-site locator would have been entitled to file an adverse and assert the same."

This expresses our contention fully. And when it is recalled that there is nothing in the record to refute the presumption that the development was made and no discovery

found at the time of our application, it is obvious not only that respondent had nothing, but could not by any possibility have anything within our ground upon which an adverse could be predicated. That being so, what right can it now assert against our patent?

But it is claimed that our contention that, our claims having passed to patent, the question of discovery is conclusive, is contradicted by the allegation in the complaint that the veins therein were discovered on January 2, 1892. Not so. Government mineral patents do not refer in general to the date of the inception of the rights of the patentee, any more than do those granted on applications for agricultural lands. Hence we allege date of discovery as shown in the patent application, and appearing as the first link in our chain of title, in order to establish the inception of our right at a time anterior to anything the respondent can claim. Thus Mr. Lindley, citing a large number of authorities to support the statement, says:

"It is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inauguration of the right, *that is, to the location upon which the patent proceedings are based*" (2 Lindley on Mines, sec. 783).

The location upon which the patent proceedings were based in the case at bar recite January 2, 1892, as the date of discovery. The amended locations of September 3, 1892 (Transcript, pp. 123–'5), made under the State statute, both recite that the lodes were "originally located on the second day of January, 1892," and that the amendments are made "without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location description or record." The Land Office in adjudicating upon the discovery necessarily found this to be the date, and as declared in the Utah case cited upon the corresponding allegation of the complaint and the proofs to support it was perfectly proper.

But counsel seems to think that proof of the averment was not sufficient from the mere introduction of the certificate. This would be so if either claim rested for its title upon the location merely. But it does not. Its location has been perfected as against all the world by its patent and its conclusiveness thereby secured. Of what avail is a patent if when the title is assailed the patentee must prove *aliunde* his compliance with all the precedent requirements for obtaining it? Counsel would have this court believe that trials affecting the right of possession to unpatented public domain, instituted under statutory requirements, and ejectment based on title in fee-simple are identical. They misconstrue the purpose of the averment, which fixes the beginning of our right as offering an issue of fact upon discovery which they may assail regardless of our absolute title.

If the question were an open one, and this was an adverse proceeding waged to inform the Government whose claim of possession is the better, we would not be here denying respondent's right to dispute our location certificates, and, if possible, to defeat it by any line of legitimate testimony. But it is no such case, and counsel fully recognize the fact when they say in effect, "Of course we cannot deny your patent. It is conclusive as to discovery. But we have the right to show that it must have been made twelve days after the record says it was. This right is ours merely because our tunnel is eleven days younger than your lode claim. If it was eleven years younger, then our right would extend for twelve years instead of eleven years. The age of your title depends on the age of the claim that would assail it, provided only the claim precedes your entry. You have a good title, but we can show when it commenced to be good, and that commencement was immediately after we surveyed a tunnel site across it." With all respect for this court and for the great ability of respondent's counsel, is not this position preposterous? Every Government grant of title to

land, of whatever character, must depend upon rights acquired to it before and upon which the grant is made. To say that it takes effect from its date only, is to destroy it in nine instances out of ten, and to seriously impair it in the tenth.

The case of Fisher *vs.* Seymour, 23 Colo., 542, cited by counsel as supporting the doctrine that a patent may be shown by parol testimony to have taken effect at a time different from the date of discovery given in the patent proceedings, is of no force as an authority here. The action was brought to enforce a trust relating to mining premises in which both trustee and beneficiary were interested. The trustee had, in violation of his fiduciary duty, sought to defeat the title of the *cestui que trust* in the premises by abandoning the original discovery and founding the patent proceedings upon a later and distinct one and under a different name. In this he succeeded, and then defended against the suit *inter alia* upon that ground. Both parties claimed under the same patent, but the beneficiary's right to enforce the trust depended upon her ability to expose the fraud of the trustee in so manipulating the patent proceedings and the patent thereby obtained as to destroy her equities and vest himself with the legal title wholly discharged of the trust. The supreme court of Colorado, as a matter of course, defeated his purpose by sustaining proof of the fraud and based the patent title upon the original discovery to the end that the complainant's equities in the patent might be sustained. It could not have done otherwise. But no such conditions exist here.

Evans *vs.* Durango Coal Company, 25 C. C. A., 531, is quoted by counsel with much confidence. The action was trespass, and damages were demanded from defendant for mining coal from lands on which plaintiff had filed a declaratory statement on October 2, 1880. The statement was suspended five days afterward by the Commissioner of the General Land Office. While suspended and on December 1,

1881, one McMaster entered the land, which he had previously and on November 26, 1881, conveyed by warranty deed to one Bell as trustee. On January 27, 1892, nearly eleven years thereafter, plaintiff attempted to make final proof of entry, whereupon a contest was ordered, resulting in the annulment of the McMaster entry, whereupon the plaintiff's entry on December 31, 1894, was accepted, followed by patent on February 28, 1895. The coal was mined from 1881 to the date of the suit, and the claim of the plaintiff involved the reopening of the relation of the patent back to the declaratory statement of 1880. The majority of the court held that a patent would not take effect as of the date of the initial step taken by the patentee to obtain title when it appears from the allegations of the complaint that the rights by him acquired by such initial step *were lost by his lack of diligence.* "Without some further allegations," said Judge Thayer, "showing how it happened that no action was taken by Evans toward perfecting his claim between October 2nd, 1880, and June 27th, 1892, although for the greater part of that time the defendant company was in possession of the land, and mining coal thereon, the inference is clear that he must have been guilty of gross laches in prosecuting his claim and in asserting his rights; *and such laches on his part would seem to be a sufficient reason why his patent should not be given effect by relation as of the date when he filed his declaratory statement.*"

Apart from the ground upon which this departure from the general doctrine of relation is justified, is the interesting fact that his honor Judge Sanborn then dissented from the conclusions of his brethren. He said: "As I read the complaint in this action, it shows that a competent quasi-judicial tribunal decided, in a case of which it had jurisdiction, that the defendants in error, and those under whom they claimed, never had any right or title to the land from which they wrongfully removed the coal in controversy, and that the plaintiffs in error, or one of them, Roger C. Evans, had, dur-

ing all the time after 1880, a right to the possession and use, and a preference right to enter the land, which eventually matured into a title. *It does not appear to me that there is any occasion to abrogate or evade the settled doctrine of relation in order to take from those who, according to the unassailable judgment of the Land Department, had a right to this land and its products, and to give those who never had any such right the coal which the latter wrongfully took from it and which may have constituted its chief value.*"

It is apparent that the efficacy of this decision is in the contrast between his Honor's past and present views concerning "the settled doctrine of relation."

The cases of which Last Chance Company *vs.* Tyler Company, 61 Federal Reporter, 557, is a type have never up to this time been recognized by this court. The doctrine may be ultimately established, and we are not disposed to here question its equity. Its purpose is to give effect to the recitals of section 2336, relating to the union of veins upon their dip and descent into the earth. After the union it belongs to the *senior location* at the surface. By senior location is or should be meant that which is disclosed in the patent proceedings to be the elder. The seniority of location is determined in the Tyler case by the time when the vein was actually discovered on the claim, although that time is proved to be some other than that recited in the patent proceedings. Whatever may be said for or against the rule, there is no reason for its application to the issue here involved. If the respondent has any rights as against the petitioner, it is to something within the territory of the Ocean Wave or Little Mary claims, not to something elsewhere, but supported by the presence of the thing itself within our vertical boundaries. It is something, too, which inheres to it *ab initio*, and by virtue of the superiority of the tunnel location *to the ground in controversy.*

The respondent has a difficult task to meet and overcome the last clause of Mr. Justice McKenna's opinion in the

Calhoun-Ajax case. It is clear, explicit, conclusive, unmistakable, and, unfortunately for the respondent, it is incapable of misconstruction. The patent relates back to the discovery. The law has been so frequently enunciated and so long enforced that a citation of authorities to support it is unnecessary. And so counsel give us a long quotation from the opinion in Carroll *vs.* Carroll, 16 Howard, 275, the general effect of which is that *obiter dicta* are not controlling—a conclusion which no one seriously controverts. But there is nothing *obiter* in this decision. The last proposition presented and argued was whether or not the plaintiff in error should have been allowed to introduce evidence to show no discovery of mineral in place on the lode claims crossed by the tunnel prior to the location of the latter. The concluding paragraph of the opinion is the only part of it dealing with that question. It was "one of the very points presented." The decision would have been incomplete without it. Counsel must therefore remain with Judge Sanborn in contending that the decision cannot affect a tunnel located prior to entry of the lode claim, or concede our contention that it is conclusive here.

The brief of plaintiff in error in the Calhoun case vigorously pressed this assignment upon the court. It asserts: "A patent is a grant of the legal title;" and had the patent issued prior to the location of the tunnel, we would not discuss this question. We are not attacking the validity of the patent; we simply desire to show that it relates back to the inception of right only. If there were no discovery of mineral in place when the receiver's receipt was issued, the entry would be void. Receiver's receipt does not create a right; it only protects such rights as have already been created; patent relates back to inception of right only. Land must be legally appropriated in order to sever it from public domain. When patent issues the fact that mineral was discovered before issuance of patent is settled. This is not the case with receiver's receipt; that instrument may be canceled

by the Land Department at any time before the issuance of patent by showing that there has been no discovery of mineral in rock in place within the limits of the location. Thus the question arises, To what date does the patent relate? The decisions of this court are not in harmony upon that point. As far as we can determine from the various decisions, the patent relates back to the discovery of ore within the limits of the location; and if there were no discovery of ore within the limits of the claim of the defendant in error at the time of the location of the Ithaca tunnel site, then the patent does not relate back to a time prior to the location of the tunnel.

"*Our purpose in offering to show these facts was that our tunnel might be adjudged to be superior in point of time to the Monarch and Mammoth Pearl claims, and thus make the patent subject to the rights of the tunnel and invoke the law as announced in Enterprise Co. vs. Rico-Aspen Co., and Ellet vs. Campbell.*"

Counsel for defendant in error in that case were quite as insistent in their opposing contention. The principal, or at least the most valuable, feature of that controversy consisted of the blind veins which the tunnel had intersected within the territory of the defendant company. Hence the plaintiff might well have claimed a favorable decision, had the court, by failing to pass upon the question, left it open to debate.

It was also presented in that case and decided by the supreme court of Colorado. "Such rights," says the court, "as are conferred by a prior valid location, so long as it remains in full force and effect, are preserved from invasion, and cannot be infringed upon or impaired by subsequent locations * * *, and are as fully protected under the rules of the common law as any other classes of real estate. Under the statutes, the subsequent locator has no right to penetrate a senior valid and subsisting location underneath

its surface boundaries extending downward vertically, except for the purposes specified in the mining law * * *. These exceptions do not include a right to drive a tunnel through such a location for the purposes of discovery * * *. Our construction of section 2323 is that a tunnel site can only embrace unappropriated public domain, and that under it no rights are conferred to extend the tunnel through previous valid locations."

Tracing the record of the Calhoun case back to its origin and its trial in the district court of El Paso county, Colorado, we find this question running through it and constituting from the outset a vital feature of the plaintiff's claim. This court, it is true, disposed of it somewhat abruptly and as one without merit, but that cannot alter the fact.

The supreme court of the State had the benefit of the views of his honor Judge Hallett, of the Colorado district, upon the question in a case entitled Stratton *vs.* The Gold Sovereign Mining Company, where the defendant insisted upon a similar right of way and a similar ownership of blind veins intersected *en route*. In that case his Honor granted the complainant's application for an injunction restraining the defendant from prosecuting work upon its tunnel within the boundaries of the complainant's lode claim, older in date and therefore senior in right to the tunnel, saying that "the territory covered by such location has been severed from the public domain and has become private property which is no longer open to a new location."

His Honor then refers to the several classes of mining locations authorized by the Federal statute, and concludes:

"When a location has been properly made in either class, *and so long as it shall be fully maintained by use and enjoyment or by patent*, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class * * * Assuming the John A. Logan location to have been well made in the month of September, 1891, and maintained thereafter, the grantors of

respondents could not afterwards locate the same territory by a tunnel, or in any other way."

His Honor added that "the Rico Aspen case reported in 167 U. S. was the subject of much comment at the bar, but it does not appear to have any bearing upon any question presented in this record."

The supreme court of Colorado summarized its own conclusions upon the subject by declaring that section 2323 "provides how inchoate rights to blind veins may become absolute, but nowhere does it in terms, either expressly or impliedly, declare that for these purposes it (the tunnel) may be projected into or across prior valid locations. To give it the interpretation that it does is to inject a meaning of which it is not susceptible, renders it irreconcilable with the provisions of the sections preceding and overthrows the doctrine of priority, the foundation upon which mining rights rest. It does not provide that under a location for tunnel-site purposes a right is granted to search for mineral in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain."

This conclusion is the necessary deduction from the construction given to section 2322 of the statutes by this court in Del Monte Company *vs.* Last Chance Company, 171 U. S., 55. By that decision the locator of a lode mining claim "is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines."

Section 2322 *gives these rights to "the locator."* The patentee is not referred to in the section. The locator may, but need not, patent his claim so long as he complies with the other requirements of the law relating to possession, he has every possible right to the premises that a patent can confer. The latter merely removes or are supposed to remove these rights from the sphere of possible contest, and relieves the owner

from the necessity of making annual expenditures upon the property. When issued, it recites the phraseology of section 2322 and finds warrant in that section as well for all that it excepts, save matters relating to surface rights of way. Hence, there can be no right in a tunnel-owner upon or beneath an unpatented senior lode location that cannot be also asserted or claimed upon or beneath a patented one.

The judicial history of the mining act of 1872 is essentially brief, yet it discloses many efforts to confine the grant of a mining patent within limits much narrower than the language and purpose of the act would justify. All of them have failed in this court, which time and again has declared that neither the Department nor the courts can import into a mineral patent any exception from its granting clauses not warranted by the language of the act itself. The one here insisted upon is not only unwarranted; it is in conflict with the recitals of section 2322; and the argument that it consists merely in locating the date of the operation of the grant and is entirely consistent therewith must be rejected when it is perceived that the purpose of postponing the date of the initiation of the grantee's title is to substitute for the grant a title not only hostile to, but practically destructive of it (Davis *vs.* Weibbold, 139 U. S., 507; Deffeback *vs.* Hawk, 115 U. S., 392; Talbot *vs.* King, 6 Montana, 76; U. S. *vs.* Iron Silver Mining Co., 128 U. S., 673; 1 Lindley on Mines, secs. 171, 175).

Blind lodes, as the miners call them, predominate. Those which come to and are visible from the surface are the exceptions, especially where the bed rock is covered by debris and the usual accumulations of soil and vegetation. A tunnel location, if good, segregates an area of 3,000 by 3,000 feet of mineral domain, and excludes the prospector from its surface unless visible or known ore deposits exist within it. This area is the equivalent of twenty lode mining claims 1,500 by 300 feet in dimensions, that being the maximum size of lode claims in Colorado. He who does this should

take care to select a territory not previously located, for the law will not tolerate the exercise of such a right in or upon that which has been appropriated by another.

Counsel emphasize the recital of the statute that no location of a mining claim shall be made until the discovery of a vein or lode within the located premises. There can be no dispute about this requirement, but counsel overlook the fact that discovery is conclusively presumed after patent. It is one of the things adjudicated by the Land Department as indispensable to the issuance of the patent, and it goes back to the time when the patent proceedings disclose the fact. *Indeed the prohibition of the statute makes it unavoidably essential that the Land Department should find that discovery was made before location, or its grant of the patent would be not only unjustifiable, but unlawful.* Hence the patent means not alone that the fee has been conveyed to the patentee, but that the latter, in compliance with the requirement of the law, made a discovery before location.

Before leaving this subject we must refer to respondent's offer of proof and exception relating to the discovery of veins in the petitioner's mining claim. They appear on page 86 of the transcript. The witness Mason was asked: "At the time of making out the location certificate of the Uinta tunnel on the 18th day of February, 1892, state if you know whether there had been a discovery of mineral in either of the discovery shafts of the Ocean Wave and Little Mary Lode mining claims, or in any other place upon either of said claims."

Objection to the question was sustained; whereupon respondent offered "to prove by this witness, that at the time of the location of the Uinta tunnel in February, 1892, *and for more than a year thereafter* there had been no discovery whatsoever of any kind, nature or description of ore in the discovery shafts of either of the Little Mary or Ocean Wave lodes and mining claims, or upon any other part or portion

of the territory embraced within the surface boundaries of either of said lodes and mining claims."

This offer is not warranted by the record. It fixes the 18th day of February, 1892, as the date of the tunnel location and assumes the right to attack the plaintiff's patent at any time before the 18th day of February, 1893. What warrant has the respondent for assuming to locate the inception of petitioner's title as of February 18, 1893? Does not the assumption disclose the danger of disengaging the patent from the location, and thereby permitting or at least suggesting to the self-interest of outsiders the expediency of attaching the inception of title to any period late enough to admit the seniority of their own claims? The offer was palpably outside of the record and properly rejected. Besides, the record of February 18, 1892, is not that of a tunnel, but of a so-called "tunnel claim" 1,500 by 3,000 feet in dimensions—something wholly unknown to any law, State or Federal.

Counsel's argument in favor of an estoppel remains to be considered. Its answer, page 60, paragraphs 13 and 14, is that it has in prosecuting its tunnel expended more than one hundred and twenty-five thousand ($125,000) dollars in and upon the tunnel; "that the same has been at all times prosecuted *under the claim of the defendant and its grantors of the right to do so by virtue of the location of said tunnel and tunnel site location under and by virtue of the laws of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of and in reliance upon said statute.*"

In other parts of the affirmative answer respondent says that the petitioner knew of the expenditure and did not oppose it, and that the consent thus manifested has ripened into a license to occupy and enjoy petitioner's premises, &c.

This claim is subject to three serious criticisms, if they are to be considered as intending to assert a title by estoppel *in pais*. The first is that there is no allegation that the ex-

penditure and entry preceded the commencement of the action; and the gravity of this omission is manifest from the added circumstance that the answer was not filed until two years seven months and twenty-six days after the commencement of the suit, during which time no judicial restraints upon the defendant's operations were imposed.

The second is that the defendant alleges its expenditure and improvements were made by virtue of its location and the rights thereby conferred upon it. It makes no pretense of having acted by virtue of or in reliance upon any act, statement, or conduct of the plaintiff, or that it was misled or deceived thereby. Lastly, it knew of the plaintiff's fee title to the premises, and so knowing could not have been misled to its injury or otherwise. And so the essential elements of an estoppel *in pais* are entirely absent from the record.

Respondent's offer of proof of this condition is equally defective (Transcript, pp. 88–89). It offered to prove by the witness Doyle "that he expended in and about the driving of the bore of the tunnel the further sum of fifty thousand ($50,000) dollars; that no objection was made by the plaintiff against the working of the tunnel; that no objection was made by them until the tunnel was driven to its present face (this was in January, 1902), a distance of 1,100 feet beyond the easterly side line of the Ocean Wave lode, and then objection was only made when the then owner of the tunnel had uncovered and discovered a vein of ore from which he was mining, extracting, and selling rich and valuable bodies of ore."

Defendant also offered "to prove by this witness that at the time the bore of the tunnel was being driven through the Ocean Wave and Little Mary lodes the then officers and agents of the plaintiff, the owners of the Little Mary and Ocean Wave claims, *acquiesced* in the driving of said tunnel through said property."

There is no pretense here of any ability to prove that this acquiescence or inaction misled the respondent, that it in any manner relied thereon, or that any expenditure was

made on the strength of it or would have been withheld on plaintiff's objection; neither is there any pretense of ignorance of the rights of the plaintiff or the character or extent of its title.

The authorities quoted by counsel on the subject of estoppels are doubtless sound, but wholly foreign to the facts at bar. It is unnecessary, perhaps, to so much as remind this honorable court that estoppels by conduct are only established and enforced where the conduct was intended to or did actually mislead another, to his injury; that the latter was ignorant of the true state of facts to which the conduct relates; that his subsequent action, expenditures, and proceedings were done and made in reliance upon such conduct, and that the acts constituting it were done with the intention that they should be relied on. None of these elements are here present.

Estoppels to be effective must be mutual. Respondent relied on its own legal rights with full knowledge of those of the petitioner; it took no step and incurred no obligations on account of any act or omission of the petitioner. Mutuality of estoppel is therefore wholly wanting. The circuit court of appeals made no reference to the alleged defense, and it is apparently urged here for lack of some more plausible ground to support that court's decision.

Allusion was made in or al argument to the fact that the grant under section 2322 is to the exclusive right of possession of all the surface included within the lines of the location, and of all veins, lodes, &c., within such lines; and emphasis was laid upon the reference of that section to the possession of the surface, from which it was argued that the tunnel claimant, possessing rights of a subterranean character, might exercise them in harmony with everything granted to the owner of the lode location.

Without conceding this deduction, it may be fully answered by calling attention to several facts wholly incon-

sistent with it. In the first place, the so-called tunnel location is made upon the surface, and consists, not of a mere line, as counsel contend, but of a square of surface territory 1,500 by 3,000 feet in dimensions and comprising 103.30 acres in extent—a location unknown to the law and without warrant (Transcript, pp. 138–139). The only record location possible would be a description of the line of the tunnel, not a piece of territory equal in extent to ten lode locations.

But in the answer the respondent asserts (Transcript, p. 39) that the locators afterwards marked the claim upon the surface, and designated it upon the ground by a line run through the trees and underbrush upon the mountain, and by stakes set at intervals along said line, duly marked with the name of said tunnel site, so that it could be easily designated upon the ground by a line run through the trees and underbrush upon the mountain, and by stakes set at intervals along said line, duly marked so that the same could be easily designated upon the ground *and upon the surface thereof.*

Here, then, is a surface claim, a marking of the same, and an invasion and appropriation of our surface.

This court in the Rico-Aspen case recognizes the right of a tunnel owner, upon intersecting a vein, to go upon the surface and locate a lode claim thereupon. This right is an inchoate one, having its inception with the location of the tunnel and maturing upon the discovery of the vein in the tunnel. When so located it relates back to the date of the location of the tunnel. Hence a tunnel location, if valid, carries potential surface rights which may become superior to those of the lode location of another across its right of way and irreconcilable with the surface rights conferred thereon by the terms of section 2322. Is it not plain that the integrity of this section can be maintained against the pretensions of tunnel claimants under section 2323 only by applying the doctrine of the Calhoun-Ajax case to all junior

tunnel locations, whether the senior lode locations they cross have been patented or not prior to the tunnel location?

We submit the case with confidence that such will be the conclusion of this honorable court.

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